RECORDS AND BRIEFS

(2)

Supreme Court, U.S.

041245 NOV 16 2004

OFFICE OF THE CLERK

Docket No.

IN THE SUPREME COURT OF THE UNITED STATES

CALVIN P. ROACH
PETITIONER

v.

TERRI L. ROACH
RESPONDENT
Attorney: Michael Farro

ON PETITION FOR WRIT OF CERTIORARI
APPENDICE
FROM ARIZONA COURTS OF APPEAL
DIVISION II
CASE: 2A CV –2000-0215
March 08, 2005
October Term beginning October 2004.

CALVIN ROACH
1777 CALLE VENTANA
SIERRA VISTA, AZ 85635
(520) 458-8105
Pro Se

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v.
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Table of Contents

Temporary Orders Appendix A
a. Minute Entry: order to Show Cause
b. Temporary Orders

Decree of Dissolution Appendix B

Court of Appeals Decisions Appendix C
a. Memo of Decision
b. Denial Motion for Reconsideration

Arizona Supreme Court Decision Appendix D

Appendix A

Minute Entry: order to Show Cause
Temporary Orders

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE

Date August 24, 2000

CASE: CALVIN PHILLIP ROACH,
vs. TERRI LEE ROACH

MINUTE ENTRY ACTION: 695: ORDER TO SHOW CAUSE CASE NO: DO200000410

JUDGE HONORABLE STEPHEN M. DESENS
DENISE I. LUNDIN, CLERK
DIVISION Two
COURT REPPORTER Penny Heins
By Rachel J. Jones 08/30/00, Deputy
ADDRESS & PHONE 481 S. Laguna Ave., Sierra Vista, AZ Docketed by_____
85635 (520)378-1382

PRESENT: Petitioner present in person and by Gary W. Ramaeker, Esquire

Respondent present in person and by Michael E. Farro, Esquire

This matter came before the Court at 3:35 p.m. for Order to Show Cause.

THE RECORD MAY SHOW that it is the Court's understanding that an agreement had been reached.

Mr. Ramaeker recited the stipulation for the record and Mr. Farro added clarification on a couple of points. The Court inquired of and heard from the parties. Both parties having agreed to the stipulation;

IT IS ORDERED: ACCEPTING the stipulation by and between the parties as stated on record.

IT IS FURTHER ORDERED:
GRANTING leave to Gary W. Ramaeker, Esquire to

prepare the formal written Order approved by Michael E. Farro, Esquire and present the same to the Court. The Court will sign the formal written Order without further hearing.

IT IS FURTHER ORDERED:

RESERVING the ruling on attorney's fees for another time.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

In re the Marriage of:	)
	)
CALVIN ROACH,	) DO200000410
	)
Petitioner,	) STIPULATED
	) TEMPORARY
and	) ORDERS
	)
TERRI ROACH,	)
	)
Respondent.	)

Petitioner's Petition for Order to Show Cause having come before the Court on August 21, 2000, and again on August 24, 2000, and the parties having reached a stipulation,

IT IS HEREBY ORDERED that pending the outcome of this case:

1. The Respondent, TERRI ROACH, shall have the care, custody and control of the minor children, JAROD ROACH and JUSTIN ROACH, JR.
2. The Respondent may move Jarod Roach from enrollment at Pueblo Del Sol elementary school to Town & Country elementary school.
3. The Petitioner, CALVIN ROACH, shall have reasonable visitation with the minor children as follows:

   (a) Alternate weekends from after school (3:00 p.m.) Friday to 6:00 p.m. Sunday.

(b) One-half the summer school vacation.
(c) Easter weekend, 2001, from 6:00 p.m. the Friday before that Easter holiday to
6:00 p.m. that day and thereafter in alternate years.
(d) Memorial Day weekend, 2002, from 6:00 p.m. the Friday before that holiday
to 6:00 p.m. that day and thereafter in alternate years.
(e) Independence Day, 2001, from 6:00 p.m. the day before that holiday to 10:00
p.m. that day and thereafter in alternate years.
(f) Labor Day weekend, 2000, from 6:00 p.m. the Friday before that holiday to
6:00 p.m. that day and thereafter in alternate years.
(g) Veterans Day weekend, 2001, from 6:00 p.m. the Friday before that holiday
until 6:00 p.m. that day and thereafter in alternate years.
(h) Thanksgiving weekend, 2000, from 6:00 p.m. the Wednesday before that holiday to 6:00 p.m. the Sunday after that holiday and thereafter in alternate years.
(i) Christmas, 2001, the first one-half of Christmas school vacation, commencing at 6:00 p.m. the last day of school before the vacation and ending at 12:00 noon in the middle of

said vacation and thereafter in alternate years.

(j) Christmas, 2000, the second one-half of Christmas school vacation, commencing at 12:00 noon in the middle of said vacation to 6:00 p.m. on the last day of vacation and thereafter in alternate years.

(k) Martin Luther King weekend, 2001, from 6:00 p.m. the Friday before that holiday until 6:00 p.m. that day and thereafter in alternate years.

(l) Presidents Day, 2002, from 6:00 p.m. the Friday before that holiday until 6:00 p.m. that day and thereafter in alternate years.

(m) Spring School Vacation, 2001, commencing at 6:00 p.m. the last day of school before the vacation and ending at 6:00 p.m. the day before school resumes and thereafter in alternate years.

(n) Petitioner is granted the care and custody of the minor children on Father's Day of each year, beginning at 6:00 p.m. the Friday before that day to 6:00 p.m. that Sunday.

(o) Respondent is granted the care and custody of the minor children on Mother's Day of each year, beginning at 6:00 p.m. the Friday before that day to 6:00 p.m. that Sunday.

(p) Petitioner is granted the care and custody of the minor children on his birthday from after school to 7:30

p.m. If Petitioner's birthday falls on Mother's Day, then he may have the children on the day before or the day after Mother's Day. If he has visitation the day before Mother's Day, the length of the visit may be extended from noon until 7:30 p.m.

(q) Respondent is granted the care and custody of the minor children on her birthday.

(r) Petitioner and Respondent anticipate that Respondent's mother will be living with her and she will care for the children in the absence of Respondent or Petitioner. Therefore, no babysitter is anticipated. In the event Respondent's mother cannot, will not or chooses not to spend time with the children in Respondent's absence, the Petitioner may be allowed to do so.

(s) Petitioner may have one mid-week visit with the children each Wednesday
from after school until 7:30 p.m., when they will be returned to Respondent.

(t) Telephonic visitation twice each week during the children's normal waking hours.

(u) Any other times agreed upon by the parties.

(v) Petitioner is allowed to pick up and deliver the children to Respondent's apartment complex prior to, after or during periods of

visitation without violating the existing protective order.

4. The Petitioner will pay to Respondent the sum of $550 per month as and for child support, dating to mid-May, 2000. Petitioner will commence paying $550 per month beginning in September, 2000.

5. The Petitioner is in arrears in his child support obligation from mid-May, 2000 through August, 2000, in the amount of $1925 less $510 he has already paid. Therefore, a balance of $1415 remains to be paid. Petitioner will pay that amount at the rate of $400 per month beginning September, 2000.

6. Child support and arrearage payments will be paid one-half on the 2nd and one-half on the 16th days of each month.

7. Child support and arrearage payments will be made directly to Respondent by delivering check to Respondent's attorney's office at 4116 Avenida Cochise, Suite E, Sierra Vista, Arizona

8. The Petitioner will pay to Respondent the sum of $74 per month for Respondent's share of Petitioner's military retirement.

9. After Petitioner has paid the child support arrearages, Respondent may request spousal maintenance by filing an appropriate motion with the Court. In that event, Petitioner may oppose the motion and a hearing will be set.

10. The issue of attorney's fees will abide the outcome of this case.

11. Respondent's mother and Petitioner will be named as parties who would be able to pick up the children from school. This will facilitate Petitioner's visitation with the children because he anticipates picking up the children from school. It also will allow for prompt attention for the children in case of an emergency.

Appendix B

Dissolution of Marriage Minute Entry
Dissolution of Marriage Order

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE

Date November 13, 2001

CASE: CALVIN ROACH, Petitioner. vs.
TERRI L. ROACH, Respondent.

MINUTE ENTRY ACTION: **DECISION ON UNDER ADVISSEMENT MATTER (429)**
CASE NO: **DO200000410**

JUDGE **HONORABLE STEPHEN M. DESENS**
DENISE I. LUNDIN, CLERK
DIVISION **Two**
COURT REPPORTER----------

PRESENT: ----------

The Court having taken this matter under advisement; and the Court having reviewed and

considered the testimony and evidence presented at the trial of this matter on October 16, 2001;

IT IS THE FINDING OF THE COURT as follows:

1. That the Court has jurisdiction in this matter.

2. That the Court accepted the stipulation of the parties made in open court that the distribution of community property and

community debts is fair and equitable under the facts and circumstances.

IT IS ORDERED as follows:

1. That the Respondent, TERRI L. ROACH, is herby awarded the legal and physical care, custody and control of the minor child of the parties, JAROD ROACH, subject to reasonable visitation rights in the Petitioner, CALVIN ROACH.
2. Accepting the stipulation of the parties that the Petitioner, CALVIN ROACH, shall have reasonable visitation rights with a step-son, JUSTIN ROACH, since the same is in the best interest of the minor child as long as the minor child consents to such visitation.
3. DENYING Petitioner's Motion for Sanctions and Motion to Speak with JUSTIN ROACH.
4. Petitioner, CALVIN ROACH, shall acquire and maintain medical and dental insurance on the minor child and Petitioner shall keep and maintain a $100,000.00 life insurance policy and shall name the minor child, JAROD ROACH as sole irrevocable beneficiary.
5. All uncovered medical and/or dental costs or deductibles shall be paid in accordance with the child support guidelines which is presently 70% by Petitioner and 30% by Respondent.
6. Respondent, TERRI L. ROACH, is awarded the federal and state tax exemptions for and shall designate the minor child, JUSTIN ROACH, as a dependent for all tax purposes.
7. The parties shall alternate the claiming of the minor child, JAROD ROACH, for federal and state tax exemption purposes and as a

dependent with the Respondent awarded such exemption on odd numbered years and the Petitioner awarded the exemption on even numbered years; therefore, Respondent, TERRI L. ROACH, shall be permitted to claim the exemption beginning in tax years 2001 and the Petitioner, CALVIN ROACH, shall be permitted to claim the exemption beginning in tax years 2002 and the parties shall alternate each year thereafter unless a child support arrearage exists at the end of a calendar year.

8. Petitioner, CALVIN ROACH, shall pay the sum of $805.67 a month as and for child support commencing with the month of December, 2001 and continuing each month thereafter until further order of this Court.
9. Petitioner shall pay the Respondent's reasonable attorney's fees and costs of suit. Counsel for Respondent shall file with the Court appropriate pleadings and affidavit for the Court's consideration as required by law.
10. Counsel for Respondent shall prepare and lodge with the Court a formal written Decree of Dissolution of Marriage consistent with the orders of the Court set forth in this minute entry order.

MICHAEL E. FARRO
Attorney at Law
4116 Avenida Cochise, Suite E
Sierra Vista, AZ 85653
(520) 458-8494
Arizona State Bar #010865
Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OFARIZONA
IN AND FOR THE COUNTY OF COCHISE

In re the Marriage of:	)
	) DO200000410
CALVIN ROACH,	)
	) DECREE OF
Petitioner,	) DISSOLUTION OF
	)MARRIAGE
and	)
	) Assigned to
TERRI L. ROACH,	) Hon. Stephen Desens
	)
Respondent	)

This matter having come before the Court on the 16th day of October, 2001, the Petitioner appearing in pro per, and the Respondent appearing in person and represented by counsel;

IT IS THE FINDING OF THE COURT as follows:

1. That the Court has jurisdiction in this matter.
2. That the Court accepted the stipulation of the parties made in open court and that the distribution of community property and community debts is fair and equitable under the facts and circumstances.

IT IS ORDERED as follows:

A. That the Respondent, TERRI L. ROACH, is herby awarded the legal and physical care, custody and control of the minor child of the parties, JAROD ROACH, subject to reasonable visitation rights in the Petitioner, CALVIN ROACH.

B. That Petitioner, CALVIN ROACH, shall have reasonable visitation rights with a step-son, JUSTIN ROACH, since the same is in the best interest of the minor child as long as the minor child consents to such visitation.

C. That Petitioner's Motion for Sanctions and Motion to Speak with Justin Roach is denied.

D. That Petitioner shall acquire and maintain medical and dental insurance on the minor child and Petitioner shall keep and maintain a $100,000.00 life insurance policy and shall name the minor child, JAROD ROACH, as sole irrevocable beneficiary.

E. All uncovered medical and/or dental costs or deductibles shall be paid in accordance with child support guidelines, which is presently 70% by Petitioner and 30% by Respondent.

F. That Respondent is awarded the federal and state tax exemptions for and shall designate the minor child, Justin Roach, as a dependent for all tax purpose.

G The parties shall alternate the claiming of the minor child, Jarod Roach, for federal and state tax exemption purposes and as a dependent with the Respondent awarded such exemption on odd numbered years and the Petitioner awarded the exemption on even numbered years; therefore, Respondent shall be permitted to claim the exemption for tax year 2001 and the Petitioner shall be permitted to claim the exemption beginning in tax years 2001 and the Petitioner shall be permitted to claim the exemption beginning in tax year 2002 and the parties shall alternate each year thereafter unless a child support arrearage exists at the end of the calendar year.

H. That Petitioner shall pay to the Respondent the sum of $805.67 per month as and for child support commencing December, 2001. Payments shall continue monthly until the child reaches the age of majority, is emancipated or until further order of the Court. With respect to a child, an emancipation event shall occur or be deemed to occur upon the earliest happening of any of the following:

(a) On the date of the child's marriage
(b) On the child's eighteenth birthday
(c) When the child is adopted
(d) When the child dies
(e) When the support obligation is terminated by the Court if support is extended beyond the age of 18.

If a child attains the age of eighteen (18) years while he is attending high school, child support will continue past the age of majority (18) during the period the child is actually attending high school until a maximum age of 19.

I. That pursuant to A.R.S. §25-320 and §25-323, the Clerk of the Court shall assign so much of Petitioner's periodic earnings to Respondent as is necessary to satisfy this child support order or any modifications hereof s may be ordered from time to time. The Clerk of the Court shall order all support to be paid by Petitioner's employer, by check payable to the Support Payment Clearinghouse, P.O. Box 52107, Phoenix, Arizona 85072-2107. The first payment shall be accompanied by an annual process fee, which must be paid annually thereafter. The present amount of this processing fee is $27.00. Payments are due by assignment of wages from the first or first two or more paychecks Petitioner receives each month.

J. That the parties have previously divided their personal property and each will keep what is presently in their possession and all their personal effects.

K. That Petitioner is responsible for and will pay the following debts and hold the Respondent harmless therefore;

Wells Fargo (student loan).....16,900.
Ft. Belvoir Credit Union.....5,000.
DPP.....5,000.

Entire Sierra Remodeling judgment, or in the event that his Sierra Remodeling law suit is successful, he will be entitled to all proceeds from that action, and any debts in his name alone.

L. That Respondent is responsible for and will pay the following debts and hold the petitioner harmless therefore;

Car Loan.....13,000.
Mastercard..... .....6,364.
Checking overdraft.....3,112.
MBNA loan.....10,000.

and any debts in her name alone.

M. That Respondent is awarded her Thrift Savings Plan.

N. the Petitioner is awarded his 401(K).

O. That Respondent is awarded a 14% interest in Petitioner's non-disability military retirement, to include future cost of living increases.

P. That Petitioner is awarded 50% of the Respondent's Federal Employees Retirement System (FERS) that has accrued from her entry date into Civil Service, August, 1996, to the date of service of the petition for dissolution of marriage, May 11, 2000.

Q. The Petitioner is awarded as his sole and separate property, the 1995 Mazda and any lien thereon.

R. The Respondent is awarded as her sole and separate property, the 1995 Chevrolet Cavalier, and any lien thereon.

S. That the Petitioner is awarded any checking and savings accounts in his name.

T. That the Respondent is awarded any checking and savings accounts in her name.

U. That the children's investment accounts will be held in trust for the children by the Petitioner.

V. Respondent is awarded $8194.00 in attorney's fees and costs.

DONE IN OPEN COURT this 21st day of December, 2001.

Stephen M. Desens
JUDGE OF THE SUPERIOR COURT

Appendix C

Arizona Court of Appeals, Memorandum of Decision

Denial of Motion for Review

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

O R D E R

2 CA-CV 2001-0215
Department B
Cochise County
Cause No. DO200000410

RE: ROACH v. ROACH

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

ORDERED: The Memorandum Decision be filed.

FURTHER ORDRED: A copy of this order together with a copy of the Memorandum Decision be sent to each party appearing herein or the attorney for such party.

DATED: November 24, 2003

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	) 2 CA-CV 2001-0215
	) DEPARTMENT B
CALVIN P. ROACH,	)
	) MEMORANDUM
Petitioner/Appellant,	) DECISION
	) Not for Publication
	) Rule 28, Rules of Civil
and	) Appellant
Procedures	
	)
TERRI L. ROACH,	)
	)
Respondent/Appellee.	)

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO200000410

Honorable Stephen M. Desens, Judge

AFFIRMED IN PART AND REMANDED IN PART WITH DIRECTIONS

ESPINOSA, Chief Judge,

¶1 Petitioner/appellant Calvin Roach and respondent/appellee Terri Roach were divorced in 2001. Appearing *pro se*, Calvin argues the trial court erred in failing to sanction Terri's attorney and in admitting

evidence "submitted through a pre-trial statement." Calvin also challenges the decree provisions granting Terri sole custody of the parties' child, awarding her a portion of his retirement benefits, ordering him to provide medical and dental insurance for their child, and giving Terri a credit on the child support award for the amount she pays to insure her children. Calvin further asserts that his right to a fair and impartial trial was violated. We affirm in part and remand in part for the limited purpose explained below.

Facts and procedural History

¶2 At the time Calvin and Terri were married in 1992, both were in military service and Terri had a son from a previous relationship. By the time their son was born, Terri's term of enlistment had expired and she stayed home with the children, working occasional temporary or "side" jobs. Terri began working full time for the Immigration and Naturalization Service (INS) in August 1996. Shortly after she completed her four-month training program, Calvin retired from the military, began collecting military retirement benefits and veterans' disability benefits, and got a job in the private sector.

¶3 Two days after a May 2000 incident, for which Calvin was subsequently convicted of domestic violence and assault, he filed a petition for dissolution of the marriage. He sought sole custody of both children and monthly child support from Terri. In her response to the petition, Terri pointed out that the oldest child was not a product of the marriage and requested custody of the parties' child, monthly child support, and spousal maintenance. After a hearing, the court entered temporary custody and child support orders pursuant to stipulation. After a trial, the court accepted the parties' stipulation that Calvin have visitation with Terri's son subject to the child's consent, divided their community assets and debts pursuant to that stipulation, awarded custody of the couple's child to Terri, and ordered Calvin to pay child support and Terri's reasonable attorney fees and costs. This appeal followed.

Denial Of Request for Sanctions

¶4 Calvin first argues the court erred in failing to sanction or hold Terri's attorney in contempt for making and assisting her in making false statements to the court.[1] Whether to award sanctions is a matter within the sound discretion of a trial court. *Woodworth v. Woodworth*, 202 Ariz. 179, 42 P.3d 610 (App. 2002); *Taliaferro v. Taliaferro*, 188 Ariz. 333, 935 P.2d 911 (App. 1996). In support of his argument, Calvin contrasts Terri's testimony at an order-to-show-cause hearing that she made $2,000 per month with her trial testimony that she made $3,400 per month.

[1]As support for this argument, Calvin cites 18 U.S.C. § 401, which defines the contempt powers of "[a] court of the United States," but is not applicable to a state court. *See* 18 U.S.C. §§ 5, 23 (defining "United States" and "Court of the United States")
Calvin claims she actually makes more than $3,800 monthly. At the order-to-show-cause hearing, however, Terri's attorney stated he had erred in asking Terri whether her monthly income was $2,000 and corrected the about to $3,000. Terri clarified that her annual base salary is $35,728 and explained it was subject to fluctuation for things such as "night differential," which she had been receiving. At trial more than a year later, Terri calculated her monthly income at about $3,400, based on her actual income for the fist nine and one-half months of that year. We find nothing in the record, nor does Calvin cite anything, supporting his assertion that Terri's monthly income was actually $3,800 or that she in any way deceived the court or engaged in "a pattern of deception and misrepresentation." See *In re Ireland*, 146 Ariz. 340.343,706 P.2d 352, 355 (1985). Accordingly,

we cannot conclude that the court abused its discretion in denying Calvin's request for sanctions.[2]

[2]Similarly, the record does not support Calvin's assertions that Terri and her attorney committed fraud, racketeering, or perjury. Moreover, questions of a witness's credibility are for the trial court to resolve. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 972, P.2d 676 (App. 1998); *Standage v. Standage,* 147 Ariz. 473, 711 P.2d 612 (App. 1985).

Pretrial Statement

¶5 Relying on Rule 37(c), Ariz. R. Civ. P., 16 A.R.S., Pt.1, [3]Calvin next contends that the court erred in allowing Terri to present evidence of her income and of a domestic violence incident, claiming she presented it n a supplemental pretrial statement in violation of the Rules of Civil Procedure. "A party who fails to timely disclose information required by Rule 26.1[,Ariz. R. Civ. P., 16 A.R.S., Pt. 1,] shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion, the information or witness not disclosed, except by leave of court for good cause shown." Aris. R. Civ. P. 37(c)(1).

[3]Terri responds that she timely filed her supplemental pretrial statement more than five days before trial as required by Rule 6(a), Ariz. Unif. R. P. Super. Ct., 17B A.R.S The Uniform Rules of Practice, however, were abrogated on December 1, 2000, well before trial was held. 198 Ariz. XXXIX.

¶6 The court denied Calvin's request for late disclosure sanctions, finding he had not been prejudiced by the evidence because the parties' stipulated property agreement had rendered the supplemental financial information irrelevant and because the court was required as a matter of law to consider the domestic violence issues in determining custody of the couple's child. *See* A.R.S. § 25-403(B) ("The court shall consider evidence of domestic violence as being contrary to the best interests of the child."). Moreover, the domestic violence incident was already well documented in the record and had been included in Terri's May 2000 disclosure statement. As for the upward correction in Terri's income, it did not prejudice Calvin because it served to lessen his proportionate share of child support. We see no basis for disturbing the trial court's conclusion that any failure by Terri to timely disclose the evidence was harmless error.

Calvin's Retirement Benefits

¶7 Calvin argues the trial court erred in awarding Terri fourteen percent of his "gross retirement," contending 10 U.S.C. § 1408(a)(2)(C) requires that Terri's share be calculated as "a percentage of disposable retired pay." Under that statute, "disposable retired pay" specifically excludes disability benefits that are deducted from the retired member's pay. 10 U.S.C. § 1408(a)(4)(C); *see also Danielson v. Evans*, 201 Ariz. 401, 36 P.3d 749 (App. 2001); *In re Marriage of Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (App. 1997). The parties' stipulated property settlement, however, awarded Terri fourteen percent of Calvin's "non-disability military retirement." Accordingly, contrary to Calvin's assertion, the court's order complies with the applicable federal statutes

¶8 In a related argument, Calvin contends the portion of the decree awarding Terri an interest in his retirement benefits does not comport with the court's post-trial findings. The court made findings, however, only on custody, child support, and attorney fees and accepted the parties' stipulation dividing their community assets and debts, including the award to Terri of fourteen percent of Calvin's non-disability military retirement benefits. Parties are bound by their stipulations unless relieved there from by a court; parties cannot stipulate to one thing and then later change their minds and unilaterally withdraw consent to the stipulation. *Pulliam v. Pulliam*, 139 Ariz. 343, 678 P.2d 528 (App. 1984).

Custody

¶9 Calvin challenges the trial court's order awarding sole custody of their child to Terri, asserting he should have been awarded sole custody instead because Terri's only motive in seeking custody was financial.[4] We will not overturn a trial court's decision on child custody absent a clear showing of an abuse of the trial court's

discretion. *Dunbar v. Dunbar*, 102 Ariz. 352, 429 P.2d 949 (1967); *Smith v. Smith*, 117 Ariz. 249, 571 P.2d 1045 (App. 1977). And we will uphold the trial court's ruling unless it is clearly erroneous or unsupported by the evidence, viewing the evidence in the light most favorable to sustaining the court's findings. *In re Marriage of Yuro*, 192 Ariz. 568, 968 P.2d 1053 (App. 1998).

[4]Calvin also sought custody of Terri's son under an *in loco parentis* theory, but was unable to meet his burden of proof to show that Terri was an unfit parent. See A.R.S. § 25-415(B) (nonparent seeking custody must show by clear and convincing evidence that awarding custody to child's legal parent is not in child's best interests).

We will not reweigh any conflicting evidence, deferring to the trial court's determination of the witnesses' credibility. *Gutierrez; Rowe v. Rowe*, 154 Ariz. 616, 744 P.2d 717 (App. 1987).

¶10 Section 25-403(B) requires a trial court to consider domestic violence as a factor against the perpetrator. See *Canty v. Canty*, 178 Ariz. 443, 874 P.2d 1000 (App. 1994). The statute "does not, however, require that the presence of this factor must automatically tip the scales against the offending spouse." *Id.* at 448, 874 P.2d at 1005. Both Terri and her mother testified that the children had been present during the domestic violence incident and had been upset by it. Both further testified that such incidents had been ongoing during the marriage. Calvin admitted he had been convicted of domestic violence after the May 2000 incident and that he had hit Terri in the face with a plate, but pointed out he had appealed the conviction on constitutional grounds.[5] In view of this testimony, we cannot say that the trial court abused its discretion in awarding custody of their child.[6]

[5]In his reply brief, Calvin asserts that his conviction was vacated in 2002. We need not consider this assertion, however, because the decree was final in December 2001. *See Thompson v. Ariz. Dep't of Econ. Sec.*, 127 Ariz. 293, 619 P.2d 1070 (App. 1980) (appellate court limited to consideration of evidence presented to trier of fact).

[6]The trial court made no findings related to custody as required by A.R.S. § 25-403(J) ("In a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child."). Calvin does not raise the issue, and we therefore do not address it.

Obligation for Child's Medical Insurance

¶11 Calvin next contends that the trial court erred in ordering him to provide medical and dental insurance for the parties' son, while "taxing him" on the child support order for the amount Terri pays for her children's medical and dental insurance. At the time the petition for dissolution was filed, section 8 of the Arizona Child Support Guidelines (Guidelines) stated in pertinent part:

> To determine the Total Child Support Obligation, the court:
>
> > a. Shall add to the Basic Child Support Obligation the cost of the children's medical insurance coverage. In determining the amount to be added, only the amount of the insurance cost attributable to the children subject of the support order shall be included. If coverage is applicable to other persons, the total cost shall be prorated by the number of persons covered.

A.R.S. § 25-320, Appendix.

¶12 The decree orders Calvin to provide medical and dental insurance for his and Terri's child. The child support order, however, allows Terri a credit for the premium she pays to cover both children on her insurance, thereby increasing the total child support obligation and Calvin's share of that obligation. The order fails to prorate the premium amount as the Guidelines require. As a result, Calvin is paying twice to insure his child and is paying a portion of the premium to insure a child unrelated to him. We therefore remand the matter to the trial court for it to remedy this error in one of two ways. It may modify the decree to order Terri to provide their child's medical and dental insurance and

recalculate the child support award to reflect only that portion of the premium attributable to the medical insurance for the parties' child. Alternatively, it may recalculate the child support award to credit Calvin with any premium he pays for medical insurance for their child and subtract any amounts Terri pays. If Terri wishes to doubly insure the child, she should bear the cost of that choice.

Fair and Impartial Judge

¶13 Finally, Calvin argues that his right to procedural due process was violated, claiming he was not afforded a fair trial by a fair and impartial judge. But Calvin did not file a notice for change of judge either as a matter of right pursuant to Rule 42(f)(1), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, or for cause pursuant to Rule 42(f)(2). "The right to apply for a change of judge for cause is waived if not timely filed." *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 481, 636 P.2d 1257, 1263 (App. 1981). In any event, that the judge ruled against Calvin does not demonstrate bias or unfairness. *See State v. Hill*, 174 Ariz. 313, 324, 848 P.2d 1375, 1386 (1993) ("[T]here is a great deal of difference between ruling on questions of law and demonstrating bias and prejudice.")

¶14 Affirmed in part; remanded in part with directions.

_____

PHILIP G. ESPINOSA, Chief Judge

CONCURRING:

_____

JOHN PELANDER, Presiding Judge

_____

PETER J. ECKERSTROM, Judge

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

December 17, 2003

RE: ROACH v. ROACH
2 CA-CV 2001-0215
Cochise County Superior Court Cause No. DO200000410

The following action was taken by the court of Appeals for the State of Arizona, Division Two, Department B on December 16, 2003.

ORDERED: Motion for Reconsideration is DENIED.

_____
John Pelander
Presiding Judge

Appendix D

Arizona Supreme Court Decision

SUPREME COURT
STATE OF ARIZONA

August 19, 2004

RE: CALVIN P ROACH v TERRI L ROACH
Arizona Supreme Court No. CV-04-0149-PR
Court of Appeals Division Two No. 2 CA-CV 01-0215
Cochise County Superior Court No. DO200000410

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 19, 2004, in regard to the above-referenced cause:

ORDERED: Review to the Arizona Supreme Court [Petition for Review] = DENIED

A panel composed of Vice Chief Justice McGregor, justice Berch and Justice Hurwitz participated in the determination of this matter.

Record from Court of Appeals, Division Two, Tucson, was an electronic link.

Noel K Dessaint, Clerk